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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-1991

ELINOR H. KERPELMAN

Petitioner,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and JOHN LUETKEMEYER, Treasurer; constituting the BOARD OF PUBLIC WORKS OF MARYLAND; JAMES B. CAINE, INC., a Maryland coropration, and MARYLAND MARINE PROPERTIES, INC., a Maryland Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The Petitioner prays that a Writ of Certiorari issue to review the final judgement of the Court of Appeals of Maryland in the above case, affirming the judgment of the Circuit Court for Worcester County, as expressed in that Court's "Opinion and Order of Court" dated August 31, 1970, in which the Worcester County Court sustained the Demurrers of the Defendants to the Bill of Complaint, and thereby ruled that the State of Maryland *could* divest itself of fee title to submerged lands under tidal waters within the State.

In affirming, the Maryland Court of Appeals went further, it is respectfully suggested, than the Worcester County Court had gone, and shut its eyes and stopped its ears to the current progressive destruction of the environment which is going on everywhere, and as to which this case is a blatant example. The court found that the Petitioner suffered no injury from the filling of Maryland wetlands, the destruction of the lowest link in the aquatic food chain, the loss of ecologically important marshlands, the destruction of various species of fish and plant life, of recreational areas and places of beauty, of areas of repose and esthetic enjoyment; and that, therefore, she had no standing to sue.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at —— Md. ——, ——Atl. 2d ———, and is set forth in the Appendix hereto, at pp. 1A to 6A

The opinion of the Court of first impression, the Circuit Court for Worcester County, is set forth in the Appendix pp.1A to 6A In that opinion, the Circuit Court for Worcester County refers to its opinion in a case called Chancery No. 8935. Larmaru Board of Public Works later decided in——Md.——, on May 10, 1971

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the Court of last resort of that State, was entered by way of filing of the Mandate of the Court, on May 12, 1971.[1]

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3), there having been asserted below and claimed here, denials of rights, priveleges and immunities secured by the Fifth, Fourteenth and Ninth Amendments to the Constitution of the United States. The highest Court of the State of Maryland, in its decision, ruled upon these said matters of denial of rights, priveleges and immunities unfavorably to the Petitioners.

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1. Although it is believed the practice has always been to measure the elapsement of time for filing this Petition from the filing date of the Mandate of the Maryland Court, it is believed counsel for Maryland Marine Properties, Inc. may argue that the filing of the appellate Court's *Opinion* amounts to final judgment. This is not so, it is respectfully argued.

Rather the mandate is the final Judgment; the Opinion of Court is but an Order *nisi*. See *Marx v Ensor* 146 Md. 603, 605, stating jurisdiction is not reacquired by a lower court until issuance of the Mandate.

See also CJS App. & Err.1958 at p. 529, at ftnt. 8 *and 8.5 and 9* including pocket-part, citing, for example, *Duval v Duval* 291 sw 488; *Mueller v National Hay* 258 sw 741; stating that *final* judgment only occurs on filing of the Mandate in the *lower* Court—a time even *later* than filing of the Mandate in the Appeals Court. To the same effect *Berger v Leposky* 103 so2d 628 (Fle.), *Coutsre v Lowery* 177 a2d 371 (Vt.) and *Durwood v Dubinsky* 361 SW 2d 779. To the same effect is the fact that by common practice in Maryland, Motion for Rearguement may by, and in fact frequently is, filed after entry of the Court's Opinion, but not after entry of the Mandate.

QUESTIONS PRESENTED

All of the questions presented seek determination of the reach of the Federal Constitution in protecting a citizen's property, or civil liberties right in the maintenance of a viable environment.

1. Did the alienation of wetlands by the Board of Public Works of Maryland, and dismissal of the Bill of Complaint below amount to a taking of property of the individual Plaintiff, or of the class which she represents, without Due Process of Law in violation of the Fourteenth and Fifth Amendments to the United States Constitution, and in violation of the Ninth Amendment to the United States Constitution, all as applied to the States by the Fourteenth Amendment?

Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the *jus publicum*? Is the *jus publicum* an integral part of the sovereignty of the state, which the State cannot divest itself of without a constitutional amendment?

Are they inalienable under a trust theory generally?

Are they inalienable under a trust theory under the circumstances alleged in the Bill of Complaint in this case?

2. Did alienation of these lands under the circumstances alleged in the Bill of Complaint violate the Fifth and Fourteenth Amendments, or the Ninth Amendment, to the Constitution of the United States.

3. Are submerged lands flowed by tidal waters inalienable under the Maryland Constitution and the Common Law of England which is in effect now in Maryland; or under Article 6 of the Declaration of Rights of Maryland; was not the failure of the Maryland Court to recognize properly the existence of the Common Law as set forth by the Petitioner, a denial to her of Due Process and a violation of the Fourteenth, Fifth and Ninth Amendments to the United States Constitution, as applied to the states by the Fourteenth Amendment?

4. Are individual inhabitants of the United States to be denied a right to complain in their courts of deprivations of property rights of the most fundamental nature possible, namely, property in an enviroment which is livable, simply because that preoperty interest is shared in common with 210,000,000

other Americans, and the individual interest of each may thus be denigrated by a court, such as the Maryland Court, which stated that the remedy was not *with the Court*, but with the legislative branch of the state government. (Last sentence of the Maryland Opinion.) Is not such a reading of the "standing" question a denial of Due Process under the Fourteenth Amendment?

5. Is the contention of the Maryland Court of Appeals that in environmental suits, in order for an individual citizen to sue, he must have "a special interest, different from the general interest of a member of the public," a denial of Due Process or Equal Protection of the laws, when the citizen seeks to reclaim, as here, ecologically important lands which have been given away to real estate speculators and developers by a state agency?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following:

1. A portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall...be deprived of life, liberty, or property, without due process of law;..."

2. A portion of the Fourteenth Amendment to the Constitution of the United States:

> "No state shall...deprive any person of life, liberty, or property without due process of law;... nor deny... equal protection of the laws..."

3. The Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."

4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume):

> "Any real or personal property of the State of Maryland...and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold leased, transferred, exchanged, granted, or otherwise disposed of, to any person, firm, corporation, or to the United States, or any agency thereof,...for consideration adequate in the opinion of the Board of Public Works,... . As used herein, the term 'real or personal property or any legal or equitable rights'...shall include the inland waters of the State and land under said waters, as well as the

land underneath the Atlantic Ocean for a distance of three miles...."

5. Article 5 of the Declaration of Rights of the Constitution of Maryland:

> "Art. 5. That the inhabitants of Maryland are entitled to the Common Law of England, ..and to benefit of such of the English Statutes as existed on the Fourth day of July, 1776;...and have been introduced, used, and practiced by the Courts of Law or Equity;...subject, nevertheless, to the revision of, amendment or repeal by, the Legislature, of this State. And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

STATEMENT OF THE CASE

In 1969, Maryland's Board of Public Works, consisting of the Governor and two appointees, "sold" to James B. Caine, Inc. a real estate speculator and developer, certain estuarial marshes near Ocean City, Maryland, at a very minimal price, which lands were to then be filled and resold privately to such of the public as might be interested in having dry land premises near the seaside resort of Ocean City, Maryland. Clearly, as was alleged in the Complaint, the developers stood fair to gain many millions of dollars in profit.

The Complaint further alleged, and since the matter was decided by Demurrer, it is for purposes of the case, by law assumed to be true, that these were lands, which in the words of the Complaint:

> "Were peculiarly adapted to the production of certain important forms of marine life, and constitut(ed) an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought...
>
> "Said lands...are intended to be, and are being, filled in and built up, by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the

consequent destruction of support to said fish and animal species aforesaid...

"(The) monetary consideration paid to Maryland was, in each case, so completely and totally inadequate...as to amount to a conveyance of the land by the...Board of Public Works, fradulently, or by mistake, or by undeu influence exerted upon it...

"The consideration for the said conveyances was also totally inadequate and insufficient, considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials, including the Defendant Board...

"The lands sold to Maryland Marine Properties, Inc.. were worth two hundred times as much in fair market monetary value (as the consideration recieved); the lands conveyed to James B. Caine, Inc., were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board. .

"The Complaint , and all others similarly situated, will be irreparably injured and damaged, and have been so, by the said conveyances...in that valuable property, which is ecologically irreplaceable, (and which is) owned by them, or held in trust for them, by the Defendant Board of Public Works, has been disposed of and closed off to the wild natural resource cycle, which it was a most essential, irreplaceable part of...(and the tax return from said filled lands will be) a totally inadequate contribution by new owners of said lands, into the State Treasury...and...will never compansate for the deprivation of said lands, and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands and , marshlands.

> which disruption may reasonably be expected to cause, or substantially contribute to, natural resourse and wild life losses of many millions of dollars measured in financial terms alone...
> "The Defendant corporations are proceeding with great speed to fill in and eradicate as marshlands and wetlands, the lands in question..."

The Complaint seeks a Mandatory Injunction, requiring reconveyance of the properties to the State, and a Declaratory Judgment by the Court that the "Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works...(are) null, void, and of no effect, and that title remains in the People of Maryland."

In the Petitioner's "Memorandum of Law" filed early in the case in court of first instance, the lengthy argument of the Petitioner concluded with a section entitled "Constitutional Arguments" (See Certified Record, Page 13 of "Plaintiff's Memorandum of Law"), in which it was stated that the State, "has denied to the Plaintiff and the class she represents, rights, privileges and immunities protected by the 5th, 9th, and 14th Amendments of (sic) the Constitution of the United States."

The Petitioner, in her "Supplementary Plaintiff's Memorandum of Law", adopted entire the theory set forth in the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696, which took the position that a state cannot divest itself, by legislative enactment, of the "inseparable incidents of sovereignty," and the " *jus publicum* and all rights of the people which are by their nature inherent or inseparable incidents thereof, are incidents of the overeignty of the State. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the *jus publicum*, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents therof..." This is clearly a (federal) Ninth Amendment argument.

Is Nisi Prius Court certainly had knowledge of the existence of this Supplementary Memorandum, for it is referred to by the Court in its Opinion (See Page11 AAppendix), but the Court below never met this argument, nor treated of it in any way.

The Court of Appeals of Maryland also did not deign to pass on any of these questions, and based its affirmance entirely on the, it is to be hoped, startling finding that a citizen has no right to sue, no "standing" to sue, where her entire enviroment is threatened; but she must instead, in order to recieve the benefits of consideration of her case by the Maryland Court of Appeals, be somehow *out-of-pocket* $3.00 worth, or a hundred dollars worth, or whatever the current dollar jurisiction of the general jurisdiction civil courts may be. At page 4, Appendix, the Maryland Court states:

> "As we have indicated, we find the threshold question of the standing of Mrs. Kerpelman to sue to be the determining issue in the appeal, and, inasmuch as we are of the opinion that she has alleged *no facts* which entitle her to sue, we shall affirm the Chancellor's Order of August 31, 1970, for this reason rather than for the reasons considered in the Chancellor's opinion about which we express no opinion..." (Emph. Supp.)

And at page 5, Appendix:

> "In Maryland taxpayers have standing to challange the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challange.'
>
> "...When the allegations of the Bill of Complaint are considered, it appears that the challanged transactions have—or will—result in the placing of *additional land on the tax rolls*..." (Emph. Supp.)

And at page 5, Appendix:

> "(This) will *increase* the tax base of the state, so that the State taxes paid by Mrs. Kerpelman will actually *be reduced* as a result of those transactions." (Emphasis—the Court's!)

The Court also Stated, at page 4A

> "There are general allegations that the conveyances will have a damaging effect upon the marine ecology of the State, but there are no allegations of fact which would support these general allegations, and, in any event, there are no allegations which indicate

how this will result in the payment of higher taxes by Mrs. Kerpelman.

"The allegations of the bill of complaint rather indicate that Mrs. Kerpelman is cncerned with the policy of the State of Maryland in regard to the preservation of the marshlands and wetlands,[1] and opposes the policy existing when the bill of complaint was filed."

"Her interest in this aspect of the matter, however, is not alleged to be different from that generally of citizens of the State; and this Court has held that there must be allegations (and ultimate proof) of a special interest, different from the general interest of a member of the public, in the Plaintiff to enable a Plaintiff to challenge a statute or the action of public officials acting under a statute."

This point—the "standing" point— in the Opinion of the Maryland Court of Appeals is challenged, and Certiorari is requested to determine whether such an unseemly holding does not violate the Due Process clause of the Fifth Amendment, as applied to the states by the Fourteenth.

ARGUMENT

Reasons for Granting the Writ

To deny a citizen-claimant access to the courts when shee seeks to right a wrong visited upon the environment which she owns in common with other citizens, and which the State holds for her, in trust, is

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1. At this point the Court in a footnote states that the General Assembly of Maryland, by Ch. 241 Laws of 1970, has effectuated substantial changes in the State's policy in this regard. This is vigorously disputed by the Petitioner. This allegation by *dictum* by the Court is neither supported nor unsupported by anything in the Record of this case, but by way of argument, the Petitioner emphatically contends that Maryland's "Wetlands Preservation Law" has been no more successfully administered to preserve wetlands, not can it be, than have various "Land Reclamation Laws" succeeded in reclaiming strip mined lands, as is believed to be well known to this court.

to deny her the Due Process and "Equal Protection" guaranteed by the Fourteenth Amendment , and the Maryland Court's holding that she does not have an interest measurable in enough jurisdictional dollars should be rejected by this Court if any of us are to survive much more than another decade in an environment rapidly becoming irreversibly fouled.

I. Due Process Was Denied

For the State of Maryland, through its court system, to deny the recognition of the Common Law of England, which is a clear part of the body of the law of Maryland, and which was explicitly adopted as a part of the law of Maryland by Maryland's Constitution, is to deny to the Petitioner Due Process; or, alternatively, where the law of Maryland declares that title to submerged lands which are part of the *jus publicum*, and are held in trust for purposes of navigation and piscary (and now for other ecological trust purposes), that alienation of such lands by the State-Trustee, to a real estate developer who will destroy their character as part of the *jus publicum*, is an alienation of a portion of the State's sovereignty, and such cannot be done by the State without sanction by constitutional amendment by the People as set forth in *Commonwealth v Newport News, supra*; such alienation having been permitted in this case, there was a denial to the Petitioner of Due Process or Equal Protection under the Fifth and Fourteenth Amendments, and/or an infringement of rights retained by the People under the Ninth Amendement, which denials by a state are, and should be, remediable by this court.

II. Citizen-Plaintiffs in Environmental Cases Are in Need of Assistance from This Court in Rectifying Environmental Damage Frequently Abetted by Uncaring State Appellate Courts which Seem Strangely Sympathetic with Enviromental Rapists

It has been many years since this Court undertook to review the environmental issues presented in the instant case; the Petitioner's principle cases were both decided around the turn of the century—they are, *Shively vs. Bowlby*, 14 S.Ct. 548, 152 U.S. 1 (1899), and *Illinois Central Railroad Company vs. Illinois*,

146 U.S. 1018, as cited in her substantive Brief below.

The Petitioner's principle substantive argument is that the *jus publicum* is inalienable.

The Petitioner's principle substantive argument is based on the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696.

The theory of that case is as follows, quoting from the case:

> "Insofar as the sovereignty and the governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof and not the abdication thereof. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of r ght of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern. For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.
>
> "When we come to consider the powers of the state Legislature under the Constitution with reference to the *public domain*, it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.
>
> *"As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the jus publicum.* But it also has, as proprietor, the right of

private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state to whose rights it has succeeded has divested itself. This right of private property is termed the jus privatum. *Farnum on Waters and Water Rights*, S. 10, S. 36a; *Gough vs. Bell*, 21 N.J. Law, 156; *City of Oakland vs. Oakland*, etc. Co., 118 Cal. 160, 50 P.277.

"The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. Farnham on Waters and Water Rights, S. 10, S. 36a; *Illinois Cent. R. Co. vs. Illinois*, 146 U.S. 387, 455, 13 S.Ct. 110, 36 L.Ed.1018; *Gough vs. Bell*, 21 N.J. Law, 156. See, also, Greenleaf's edition of Cruise on Real Property, vol. 2 p. 67, note.

"On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its *jus privatum*. Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose, for which the Constitution was ordained, *except such as arises from the existence and inalienability of the jus publicum.*

"From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the jus publicum. Or, to state it differently, the

> Legislature *may not make a grant of a proprietary right* in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the jus publicm...
>
> "See also *Illinois Cent. R. Co. vs. Illinois,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.1018.
>
> Emphasis has been supplied throughout.

Larmar Corporation, v. STate of Maryland, Chancery No. 8935, later appealed to the Court of Appeals of Maryland, with Opinion rendered May 10, 1971, ———Md. ————, ————A2d.

It is of note that although the Maryland Court of Appeals denied that the Petitioner had standing, yet in the Larmar case, referred to by Judge Prettyman (decided May 10, 1971, ———Md. ———, ———A2d ———), the Petitioner had sought to intervene and contended by way of Affidavit that she believed the Larmar suit was a collusive and sham suit. This proffer was rejected outright, and the Attorney General of Maryland accorded full standing to conduct the litigation which the Petitioner contended was fraudulent. Not being allowed to intervene as a party, she was unable to substantiate the rather clearly inferrable situation of collusion by use of Discovery procedured.

The hospitality the Maryland Court is apparently ready to concede its citizens is something less than it appears ready to accord real estate development corporations and public of ficials.

III A Constitutional Amendment Would be Necessary to Alienate These Lands

Rights Held jus privatum then (see above), are alienable, but rights *jus publicum* are part of the sovereignty given over by the people to the state. They cannot be altered by statue, as the Legislature has no right to inipair the sovereignty or sovereign rights. Rights of navigation are immemorially included. So, we contend, are rights "environmental" in nature. In either case, submerged lands could not be relinquished, except by Constitutional Amendment by the people.

IV This Case May Be One Appropriate For Relief to be Granted Under the Ninth Amendment

Small and Jayson, in "The Consitution of the United States of America" (1964), are able to devote but a sparse half page to the Ninth Amendment, titled "Rights Retained by the People".

After quoting the Ninth Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.", the Editors state:

> "The only right which the Supreme Court has explicitly acknowledged as being protected by this amendment is the right to engage in political activity. That recognition was accorded by way of *dictum* in United Public Workers vs. Mitchell, where the powers of Congress to restrict the political activities of federal employees was sustained..." (The case is cited as 330 U.S. 75, 94 (1947.) Tennessee Power Company vs. T.V.A., 306 U.S. 118, 143, 144 (1939).; and Ashwander vs. Tennessee Valley Authority, 297 U.S. 288, 330, 331 (1936), as well as two apparently concurring opinions, Justice Chase, in Caulder vs. Bowl 3 Dall. 386, 388 (1798), and in Loan Association vs. Topeka, 20 Wall 655, 662-663 (1874), are cited to show rejection of Ninth Amendment arguments previously by this Court.

It is respectfully suggested that the Court may once again wish to give consideration, as has been intimated frequently of late by conservationists, to the use of the Ninth Amendment, which may be perhaps peculiarly apt for the protection of environmental rights.

V. Illinois Central v. Illinois 146US387

In *Illinois Central Railroad Co. Vs. Illinois, supra* the Court said, at page 1040:

> "We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake,...
>
> "We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therin as it may deem

proper for its interest in it's business. The claim is founded upon the third section of the act of the Legislature of this State passed on the 16th of April, 1869, the material part of which is as follows:

"Section 3. (The Illinois Central Railroad Co. is given)...all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater...(and these)...are hereby granted in fee to said Illinois Central Railroad Company, its successors and assigns."

'The questions presented relate to the validity of the sections cited of the act... '...As to the grant of the submerged lands, the act decared that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan, ..

are granted in fee to the railroad company, its successors and assigns".

"This clause is treated by the counsel of the company as an absolute conveyance...as if they were uplands, in no respect covered by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the Legilature was competant to make a grant of this kind...

"The question...is whether the Legislature was competentto thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters;...

That the state holds title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the Common Law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are opened to pre-emption and sale. *It is a title held in*

trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therin, free from the obstruction or interference of private parties.

'The interest of the people in the navigation of the waters, and the commerce over them , may be improved in these instances by the errection of wharves, docks, and piers therin, for which purposes, no valid objections can be made to the grants...And grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid excercise of legislative power consistent with the trust to the public upon which such lands are held by the state...The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. The control of the state for the purposes of the trust can *never* be lost,..."

Thus the Maryland statute, by the test of *this* case, is unconstitutional, in allowing the Board of Public Works to dispose of any lands simply for a consideration which it deems to be adequate, when the test must be, under the dictates of this case, whether the alienation will produce any substantial impairment of the public interest in the lands and waters remanining, regardless of the consideration.

Continuing in, *Illinois Central vs. Illinois,* at page 1043:

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation, and use of the waters, parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the*

> *preservation of the peace*...So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state. .
>
> "The idea that its Legistature can deprive the state of control over its bed and place the same in the hands of a private corporation created for a different purpose and limit it to transportation of passengers and freight between distant points and the city is a proposition that cannot be defended."

And quoting Chief Justice Taney, the Court went on to say:

> "The sovereign power itself, therefore cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which could never be long borne by a free people.
>
> Many other cases might be cited wherein it has been dicided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for the public uses for which they are adapted. *Martin vs. Waddell* 41 U.S. 16...(Other citations)."

Then the Court went on to speak of the *jus privatum* and *jus publicum*.

All of the above, the Worcester County Court dismissed with the statement that..."Unless the law in force in the State of Maryland in which the Appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction is neither persuasive nor controlling."

Not Persuasive? Obviously not in Worcester County; controlling—well does the Supreme Court control in Worcester County? Some think not, some think yes. Some love anarchy, especially in the innocent guise of "conservatism", and so seems the Honorable Court below.

Then after dispensing thus of Supreme Court holdings, the Worcester County Court states that:

> "The individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states were free to alienate..."

VI. "Riparian Rights" In Worcester County

The Court assumed that "riparian rights" means the right to do everything, including dredging, filling, swiping all the oysters, building a housing development all the way to the other shore, or paving over the whole bay.

The most fundamental perusal of Black's Law Dictionary, or of *Shively vs. Bowlby, infra*, will indicate, however, that "riparian rights" is a very exact and fixed term, which does not include any of these things, and includes very little more, if anything, than the right to "wharf out" to the deep portion of the stream, and to have continued access at all times to the navigable waters in front of the owner's property. See also *Illinois Central Railroad* on riparian rights.

This new and modern transmutation of that phrase into absolute control is a thought fond to the hearts of developers and Maryland Eastern Shoremen, perhaps but is not in accord with the state of the law now nor ever.

CONCLUSION

Wherefore, the Petitioner prays a Writ of Certiorari be issued to the Court of Appeals of Maryland, that the Court may consider reversing the judgements of the Circuit Court for Worcester County, and of the Court of Appeals.

Respectfully submitted,

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IN THE COURT OF APPEALS OF MARYLAND

No. 364

September Term, 1970

ELINOR H. KERPELMAN

v.

BOARD OF PUBLIC WORKS OF MARYLAND
et al.

Barnes
McWilliams
Finan
Sngley
Smith,

JJ.

Opinion by Barnes, J.

Filed: April 12, 1971

In this appeal from the Order of the Circuit Court for Worcester County (Prettyman, J.) dated August 31, 1970, sustaining the demurrers of two of the appellees, Maryland Marine Properties, Inc. (Maryland Marine) and the Board of Public Works (Board), without leave to amend, to the bill of complaint filed by the appellant, Mrs. Elinor H. Kerpelman, the decisive question is whether or not Mrs. Kerpelman had standing to sue. Having concluded that she does not have such standing, we do not reach the other interesting questions of the constitutionality of Code (1965 Repl. Vol.), Art. 78A, 15 (the Statute, and of the propriety of the actions of the Board under that statutory provision and laches.

Mrs. Kerpelman's bill of complaint, filed on September 30, 1969, alleged in paragraph 1 that she "is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated." She then alleges in paragraph 2 that the Board is given authority by the Statute to dispose of lands of the State of Maryland by sale or otherwise, provided that this is done for " 'a consideration adequate in the opinion of the Board...' " Also, by Art. 6 of the Declaration of Rights of the Maryland Constitution, the members of the Board, individually are " 'Trustees of the Public' " in all that they do and must reasonably excercise this fiduciary duty, particularly in regard to their stewardship of property.

It is then alleged in paragraph 3 that in 1968 contrary to the Art. 6 Trusteeship, and without the necessary opinion as to adequacy, the Board—then composed in part of different

1. The Cancellor passed an order on September 22, 1970, sustaining the demurrer of James B. Caine, Inc., without leave to amend, for the same reasons assigned in its opinion and order of August 31, 1970; but the order for appeal was not filed until October 26, 1970, or more than the 30-day period provided for appeal under Maryland Rule 812. The defendant and appellee, James B. Caine, Inc., moved to dismiss this appeal pursuant to Rule 835 b (3); and this court idsmissed this appeal on November 16, 1970.

membership—but being the same constitutional and statutory Board as the present Board, conveyed 190 acres of land then the property of the people of Maryland to the defendant and appellee, Maryland Marine Properties, Inc., 197 acres of Maryland lands, or did so by mesne conveyances "both for a totally inadequate and insufficient consideration, compared with the fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy," so that the conveyances were illegal and void for failure to comply with the precondition set forth as to adequacy in the Statute and as a violation of the Art. 6 Trusteeship. It is also alleged in paragraph 3 that the consideration for the conveyances was also totally inadequate and insufficient considering "the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned" by Mrs. Kerpelman and all others similarly situated and which are held in trust for her and the class she represents in the suit, by the State of Maryland and its public officials including the Board.

The lands mentioned in paragraph 3 are described in paragraph 4 as situate in Worcester County and are marshlands and wetlands, *i. e.*,

marshes and shallows, peculiarly adapted to the production of certain important forms of marine life and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland and upon the waters of the State, "which are owned in common, and used by all of the members of the class on whose behalf this suit is brought." These marshlands and wetlands are being filled in and built up by those to whom they were conveyed, it is alleged in paragraph 5, so that their character as such lands is being completely obliterated with the consequent destruction of fish and animal species already mentioned.

In paragraph 6, it is alleged that the lands conveyed to Maryland Marine were sold by an exchange for other marshlands

and wetlands which are "cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed" to Maryland Marine. The land thus exchanged was worth only $41,000.00 while the lands conveyed to Maryland Marine "were worth two hundred times as much in fair market monetary value." The lands sold to James B. Caine, Inc. were alleged to have been sold to it for the "completely and totally inadequate money consideration' of $100.00 an acre and such lands were worth approximately 500 times as much in fair market value as the monetary consideration received by the Board. The monetary consideration, it was alleged in paragraph 7, was, in each case, "so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulantly, or by mistake, or by undue influence exerted upon it."

In paragraph 8, it was alleged that Mrs. Kerpelman, the plaintiff, and "all others similarly situated" will be and have been irreparably injured and damaged by the two conveyances mentioned "in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them" by the Board, has been disposed of and closed off to the wild natural resource cycle of which it was a "most essential, irreplaceable part." The plaintiff and all others similarly situated are deprived of their use and benefit of these lands for "a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone."

Paragraphs 9 and 10 allege that Maryland Marine and James B. Caine, Inc. are "Proceeding with great speed to fill in and

eradicate as marshlands and wetlands" the lands in question and that the plaintiff has no adequate remedy at law.

The prayers for relief are that:

1. The case be advanced for immediate trial and hearing on any motions filed.

2. A mandatory injunction be issued requiring Maryland Marine and James B. Caine, Inc. to reconvey to the State of Maryland the lands in question.

3. The Court declare that the conveyances of the lands in question be declared to be null, void and of no effect and that "title remains in the People of Maryland."

4. The plaintiff have other and further relief.

Maryland Marine filed a demurrer to the bill of complaint on October 20, 1969, alleging three grounds for demurrer:

1. No facts were alleged sufficient to constitute a cause of action or entitling the plaintiff to any of the relief prayed for in the bill of complaint.

2. The plaintiff failed to allege facts sufficient to establish her standing to sue in the case.

3. The plaintiff is barred by laches.

The Board, on October 21, 1969, also filed a demurrer stating in allegations 1 through 4 that no cause of action in equity was alleged entitling the plaintiff to the relief prayed for in the bill of complaint; that the Statute (set out in full) imposed no limitation upon the power of the Board to dispose of the property involved in the suit and the Board was authorized as a matter of law to dispose of that property.

5. There was no allegation that the alienation of State property was not " 'for a consideration adequate in the opinion' " of the Board as provided in the Statute.

6. There were no allegations that the procedure used by the Board in connection with the disposition of the property was "improper, defective or in any manner contrary to law."

7. The exercise of the Board's discretion, if not exercised fraudulently or corruptly, is not subject to review by a court of equity.

After the submission of legal memoranda by counsel for the

parties and argument, the Chancellor, in a well-considered, written opinion concluded, *inter alia* that the demurrers should be sustained, without leave to amend, because the General Assembly had properly amended the common law by the Statute which gave the Board the power and discretion to make the conveyances in question and that the "strict trust theory" proposed by the plaintiff was not applicable. The Chancellor did not find it necessary to consider the standing of the plaintiff to sue.

As we have indicated, we find the threshold question of the standing of Mrs. Kerpelman to sue to be the determining issue in the appeal and, inasmuch as we are of the opinion that she has alleged no facts which entitle her to sue, we shall affirm the Chancellor's order of August 31, 1970, for this reason rather than for the other reasons considered in the Chancellor's opinion about which we express no opinion. Cf. *Citizens Committee v. County Commissioners*, 233 Md. 398, 197 A.2d 108 (1964).

Mrs Kerpelman first alleges her standing to sue as a taxpayer of the State of Maryland, residing in Baltimore City. There is no allegation that she is a taxpayer of Worcester County and, as a resident of Baltimore City, the inference would be that she was not a Worcester County taxpayer. Whatever interest she has in the subject matter as a taxpayer of the State generally is the interest which any other taxpayer of the State generally has in that subject matter. The property in question is located in Worcester County but Mrs. Kerpelman alleges no interest in that property as a local taxpayer.

In this type of situation, Judge McWilliams, for the Court, stated the applicable rule in regard to the standing of a taxpayer to sue in *Stovall v. Secretary of State*, 252 Md. 258, 263, 250 A.2d 107, (1969), as follows:

> "In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge."

See also , *Murray v. Comptroller* 241 Md. 383, 391, 216 A.2d 897 (1966); *Citizens Committee v. County Commissioners*, 233 Md. 398, 197 A.2d 108 (1964); and *Baltimore v. Gill*, 31 Md. 375, 394 (1869).

When the allegations of the bill of complaint are considered, it appears that the challenged transactions have – or will – result in the placing of additional land on the tax rolls which will *increase* the tax base of the State so that the State taxes paid by Mrs. Kerpelman will actually *be reduced* as a result of those transactions. There are general allegations that the conveyances will have a damaging effect upon the marine ecology of the State, but there are no allegations of facts which would support these general allegations and, in any event, there are no allegations which indicate how this will result in the payment of higher State taxes by Mrs. Kerpelman.

The allegations of the bill of complaint rather indicate that Mrs. Kerpelman is concerned with the policy of the State of Maryland in regard to the preservation of the marshlands and wetlands, and opposes the policy existing when the bill of complaint was filed. Her interest in this aspect of the matter, however, is not alleged to be different from that generally of citizens of the State; and this Court has held that there must be allegations (and ultimate proof) of a special interest, different from the general interest of a member of the public, in the plaintiff to enable a plaintiff to challenge a statute or the action of public officials acting under a statute. *Houck v. Wachter*, 34 Md. 265, 6 Am.Rep. 332 (1871) which has been cited and followed in over twenty-five Maryland cases including *Bauernschmidt v. Standard Oil Co.*, 153 Md. 647, 138 A. 531 (1927) and most recently *Rogers v. Md. – Nat'l Cap. P. & P. Comm'n*, 253 Md. 687, 253 A.2d 713 (1969).

An analogous case to the present case is *Citizens Committee v. County Commissioners, supra*, in which persons opposed to the policy of the State in regard to slot machines in Anne Arundel County sought, as taxpayers, to challenge the validity of the Maryland Statutes and Anne Arundel County Ordinances permitting the licensing of slot machines. There were allegations

of general injury to the State from the operation of these gaming devices; but we held that, inasmuch as the allegations and proof indicated that the revenue derived by the County from such licensing *decrease* the County tax rate and the taxes payable by the plaintiffs in the *Citizens Committee* case, the plaintiffs, *as taxpayers*, had no standing to sue and that, as members of the public, they had no standing to sue because their alleged injury was no different from that suffered generally by the public, and there must be an allegation and ultimate proof of *special injury* to establish standing to sue.

The instant case is to be distinguished from our decision in *Thomas v. Howard County, Maryland*, Md. , A.2d (1971) [No. 353, September Term, 1970, decided April 12, 1971] in which the allegations of the bill of complaint were sufficient to establish, prima facie, injury to the plaintiffs as taxpayers and there were no allegations on the face of the bill of complaint indicating that the challenged action resulted in a *decrease*, but that it *increased* the taxes payable by the plaintiffs.

Mrs. Kerpelman, secondly, in paragraphs 2 and 3 of the bill of complaint seeks to establish her standing to sue upon the novel theory that she, as a member of the public of Maryland, is a beneficiary of a "public trust" flowing from Art. 6 of the Declaration of Rights of the Maryland Constitution stating that persons invested with the legislative or executive powers of government "are Trustees of the Public, and, as such, accountable for their conduct...."

Article 6 is hortatory in nature — see *Bernstein v. Board of Education of Prince George's County*, 245 Md. 264, 226 A.2d 243, 248 (1967) — and sets forth the well-established doctrine that the duties of public officials are fiduciary in character and are to be exercised as a public trust. The lands in Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecillius Calvert, Baron of Baltimore, his heirs, successors and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation. *Brown v. Kennedy*, 5 H. & J. 195 (1821). By virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland become entitled to all

property derived from and under the Charter and thereafter the State of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character. Art. 6 of the Declaration of Rights, however, does not purport to change, modify or enlarge the nature of this holding by the State to by the State or to give to a citizen of Maryland any different status to challenge a statute or the activities of public officials acting under a statute that exists in regard to any other matters of State concern. No decision of this Court is cited to sustain the construction of Art. 6 urged upon us by Mrs. Kerpelman and we know of no such decision. In our opinion, it would be an unwarranted departure from our decisions and those of our predecessors, already mentioned, on the subject of standing to challenge the constitutionality or application of a statute, to adopt the construction of Art. 6 urged upon us by the apellant. Her remedy, as a member of the general public without suffering injury as a taxpayer or having a special interest in the subject matter, lies with the legislative branch of the government and not with the courts.

ORDER OF AUGUST 31, 1970, AFFIRMED, THE APPELLANT TO PAY THE COSTS.

OPINION AND ORDER OF COURT [AUG. 31, 1970]

This is another one of those cases in which rulings required upon pleadings now before the Court for determination can obscure the principal issue presented to the Court at the time of the Hearing on the pleadings on May 11, 1970.

On September 30, 1969, the Complainant filed a "Bill of Complaint For A Mandatory Injunction, And For Declaratory Relief". Upon the reading of the Bill, however, and the prayers for relief, it becomes apparent that the complaint does not actually state a typical cause of action as usually embraced in a petition for a declaratory decree or declaratory judgment. In other words, the Bill does not actually seek a declaration of rights of the parties, but seeks the specific relief as requested in the said prayers, the contents of which follow:

"WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any Motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three

specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer' ".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a

"Petition To Intervene As Plaintiffs", upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a "Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs", alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a "Motion Ne Recipiatur" to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon "facts not apparent from the face of the record, and yet was not under affidavit". Interestingly enough, no copy of the Complainant's Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969 in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a "Memorandum In Support Of Preliminary Objection", the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a "Motion For Summary Judgment Upon Some Issues", alleging "no dispute as to any material fact concerning the following issues"; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Balti-

more City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated."

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed as "Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.", in which the Complainant suggested that "counsel has missed the point", because of the contention of the Complainant that "nobody" has an alienable title to the lands in question.

On June 17, 1970, the Complainant filed a "Supplementary Plaintiff's Memorandum Of Law", in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

Petition to Intervene

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the "North American Habitat Preservation Society", for whom Leonard J. Kerpelman, Esq. is "solicitor" as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. Horace Mann League vs. Board, 242 Md. 645, at page 652. Citizens Committee vs. County Commissioners, 233 Md. 398, Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual,

however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarck. It seems also to follow that a determination of the contentions and issues raised by the Complainant would likewise be determinative of the contentions and issues raised by Mr. Grabarck, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarck and the Complainant Kerpelman. That difference is the fact that no where in the Petition to Intervene is it alleged that Mr. Grabarck is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarck, as an individual, will be, likewise, denied.

Motions Ne Recipiatur

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this

defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

Motion Raising Preliminary Objection

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

Motion Ne Recipiatur of Complainant to Demurrer of Maryland Marine Properties, Inc.

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant

has over simplified the law with regard to the inclusion of a charge of laches in a demurrer.

> "The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra §142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiesence and call for explanation, the bill is demurrable." 9 M. L. E. "Equity", Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

Demurrers

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. Kelley vs. Davis, 233 Md.

494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire jus publicum and vests in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

> "Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public and, as such, accountable for their conduct: . . ."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and

never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

> "Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, . . ,".

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

> "Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland 1799 Edition. It reads as follows:

> "III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since

made in England or Great Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; *subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State*: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. Lutz vs. State 167 Md. 12, Heath vs. State, 198 Md. 455, Goldenberg vs. Federal Finance, 150 Md. 298, 5 M.L.E. "Common Law", Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in Shively vs. Bowlby, 14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be

determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in Shively vs. Bowlby, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treaties, encyclopedic compendiums, and conclusions based upon summaries of annotations must be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in pri-

vate land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland Law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with The Wharf Case, reported in 3 Bland at page 361, and continuing through Causey vs. Gray, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in Western Contracting Corporation vs. Titter, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

> "Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . ."

The language which Counsel for the Complainant has selected from Shively vs. Bowlby with regard to the imposi-

tion of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in Shively vs. Bowlby presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of the Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, President, and Individually, on January 26, 1970, is DENIED;

2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;

3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;

4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;

5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;

6. The Demurrer of Dependant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;

7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and

8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding.

DANIEL T. PRETTYMAN,
Judge

TRUE COPY, TEST: Frank W. Hales, Clerk

FILED
SEP 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,
Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT BOARD OF PUBLIC WORKS OF MARYLAND IN OPPOSITION

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The Daily Record Co., Baltimore, Md. 21203

IN THE

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OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

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v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT BOARD OF PUBLIC WORKS OF MARYLAND IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is reported in 261 Md. 436, and 276 A. 2d 56.

QUESTION PRESENTED

Whether the decision of the Court of Appeals of Maryland was based upon an independent state ground?

STATEMENT OF THE CASE

The Court of Appeals of Maryland affirmed the order of the Circuit Court for Worcester County, Maryland, sustaining without leave to amend the demurrers filed by Respondents, Maryland Marine Properties, Inc. and Board of Public Works of Maryland, to the Bill of Complaint of Petitioner.

The Bill of Complaint sought the issuance of a mandatory injunction requiring Maryland Marine Properties, Inc. and James B. Caine, Inc. to reconvey to the State of Maryland certain lands in Worcester County, Maryland, which had been conveyed by the Board of Public Works of Maryland in accordance with the power and authority vested in the Board by Section 15 of Article 78A of the Annotated Code of Maryland. In affirming the Order of the Circuit Court, the Court of Appeals of Maryland held that the Petitioner's decisive question before it was whether or not the Petitioner had standing to sue and having concluded that she did not have such standing did not reach the other questions posed in Petitioner's Bill of Complaint.

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS WAS BASED UPON AN INDEPENDENT STATE GROUND.

The Court of Appeals concluded that the Petitioner had failed to establish her standing to sue. The United States Supreme Court has held that it lacks jurisdiction to review judgments of state courts that rest on adequate and independent state grounds:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (citing cases). The reason is so obvious

> that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125.

The Court of Appeals of Maryland held that the Petitioner had no standing to sue as a taxpayer because there were no allegations indicating that the actions complained of would result in higher State taxes to her and that her general allegations that the conveyances would have damaging effect upon the marine ecology of the State indicated an interest no different from that generally of citizens of the State (Pet. 5A-6A).

The United States Supreme Court has also held that one who sues as a taxpayer alleging injury by unconstitutional conduct must establish a direct dollar and cents injury or threat of injury (*Doremus v. Board of Education*, 342 U.S. 429), and that when a taxpayer seeks to restrain what he alleges are unconstitutional acts he must be able to show not only that the statute under which the government acts is invalid "but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, *and not merely that he suffers in some indefinite way with people generally.*" *Massachusetts v. Mellon*, 262 U.S. 447 at 488. (Emphasis supplied.)

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

JON F. OSTER,
Assistant Attorney General
of Maryland,

For Respondent,
Board of Public Works
of Maryland.

Supreme Court, U.S.
FILED
SEP 8 1971

IN THE

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ELINOR H. KERPELMAN,

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v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENT MARYLAND MARINE PROPERTIES, INC.

THOMAS P. PERKINS, III,
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(301) 752-6780.

Attorney for Respondent,
Maryland Marine Properties, Inc.

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

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v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENT MARYLAND MARINE PROPERTIES, INC.

OPINION BELOW

Kerpelman v. Board of Public Works, 261 Md. 436, 276 A. 2d 56 (1971).

JURISDICTION

As is set forth in the Argument below, this Honorable Court lacks jurisdiction because the Petition for a Writ of Certiorari was not timely filed and because the decision of the Court of Appeals of Maryland was based solely upon adequate and independent state grounds.

QUESTIONS PRESENTED

I.

Was the Petition for a Writ of Certiorari filed within ninety days of the entry of final judgment by the Court of Appeals of Maryland, the highest court of the State of Maryland?

II.

Was the decision of the Court of Appeals of Maryland based upon adequate and independent state grounds?

STATEMENT OF THE CASE

The Court of Appeals of Maryland, in its opinion and order filed on April 12, 1971 (Pet. 1A-8A), affirmed the order of the Circuit Court for Worcester County, Maryland dated August 31, 1970 (Pet. 21A-22A). The order of the lower court, *inter alia*, sustained without leave to amend the demurrer filed by this Respondent, Maryland Marine Properties, Inc., to the Bill of Complaint of Petitioner.

The Bill of Complaint challenged a transaction entered into in 1968 between Respondent, Board of Public Works of Maryland, and this Respondent, Maryland Marine Properties, Inc. The Bill of Complaint alleged that the Board of Public Works of Maryland, acting in accordance with the authority expressly vested in it by the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), conveyed the State's interest in 197 acres of marshlands located in Worcester County on the Eastern Shore of Maryland, to Respondent, Maryland Marine Properties, Inc., the owner of the riparian shore line adjacent to the marsh. Such conveyance was alleged to have been made in exchange for the conveyance to the State of Maryland of other marshlands

owned by Respondent, Maryland Marine Properties, Inc. The concern expressed by Petitioner in her Bill of Complaint was that Respondent, Maryland Marine Properties, Inc., intended, in 1968, to fill and otherwise improve the marshlands in question. There is no allegation, however, in the Bill of Complaint that any such activity was or would be in violation of any federal, state or local statute or regulation, or that Respondent failed to obtain all necessary permits required by the various regulatory agencies.

In the Bill of Complaint, Petitioner based her standing to challenge the transaction above solely on her status as a taxpayer and resident of Baltimore City, which is far removed from the property in question, located on the Eastern Shore of Maryland.

ARGUMENT

I.

THE PETITION WAS FILED TOO LATE.

The Maryland Court of Appeals rendered its opinion and final order in this case on April 12, 1971. The Petition for a Writ of Certiorari was not filed in this Court until August 9, 1971, more than ninety days after the entry of the final order of the Court of Appeals of Maryland and without an extension being granted by a Justice of this Court. The decisions of this Court, the Maryland Court of Appeals and the United States District Court for the District of Maryland make it clear that such late filing violates the requirements of 28 U.S.C. §2101 (c) and Rule 22 of this Court and that the Petition, therefore, should be denied.

The test for determining when a judgment of a state court becomes final for the purpose of review by this Court and, therefore, for determining when the ninety-day period begins to run, was set forth in *Market Street*

Ry. v. R.R. Commission, 324 U.S. 548 (1945). Mr. Justice Jackson stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run." (324 U.S. at 551-552.)

Under Maryland practice, it is clear that the issuance and docketing of the opinion and order of the Court of Appeals of Maryland, which in this case took place on April 12, 1971, is the critical date for the application of the rule set forth above. This is the date of decision referenced for this case and for all Maryland Court of Appeals cases by both the Maryland and Atlantic reports.

The Court of Appeals of Maryland has had specific occasion to construe its own rules of appellate procedure in light of the federal ninety-day requirement for certiorari. The Maryland court was squarely faced with the issue of what criminal convictions had become final under the test of *Linkletter v. Walker*, 381 U.S. 618 (1965) at the time the Maryland court handed down its landmark decision in *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) on October 11, 1965. The resolution of this issue involved an express determination of whether in each case the time for the filing of a petition for writ of certiorari in this Court had expired. In *Tucker v. Warden of Maryland Penitentiary*, 243 Md. 331, 220 A. 2d 908 (1966), the Court of Appeals of Maryland expressly held that the prior Tucker conviction became final on July 13, 1965, the date the court issued an order dismissing the appeal. This

is the corresponding date to April 12, 1971 in this case. See also *Terry v. Warden of Maryland Penitentiary*, 243 Md. 610, 221 A. 2d 691 (1966). Similarly, in *Cowans v. Warden, Maryland Penitentiary*, 276 F. Supp. 696, 698 (D. Md., 1967), a *habeas corpus* case, the court held that the Petitioner's conviction became final on the date when the opinion on his direct appeal to the Maryland Court of Appeals was filed.

Ignoring the controlling authorities cited above, Petitioner contends that the date of the issuance of the mandate under Maryland practice is the critical date for the purpose of filing a petition for a writ of certiorari. Under Maryland practice, the issuance of a mandate is a routine ministerial function performed by the clerk of the court. See Rule 876b of the Maryland Rules of Procedure, Vol. 7B of the Annotated Code of Maryland (1963 Repl. Vol.). In the mandate, the clerk merely certifies the previous entry of the final action of the court. The date of the mandate has no significance for the purpose of determining the appropriate time in which to file a petition for certiorari in this Court.

II.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IN THE INSTANT CASE WAS BASED SOLELY UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

After a careful review of the factual allegations set forth in Petitioner's Bill of Complaint, the Maryland Court of Appeals affirmed the decision of the lower court, concluding that Petitioner had failed to establish her standing to sue. This Court has consistently held that it lacks jurisdiction to review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Fox Film Corp. v. Muller*, 296

U.S. 207, 209-210 (1935). A state court ruling based upon standing to sue constitutes adequate and independent state grounds. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281-282 (1961).

To attack in this Court a decision based upon independent state grounds, Petitioner must clearly show that the ruling of the state court was frivolous and contrary to previous precedents or that the decision places a totally unreasonable obstacle in the way of judicial enforcement of alleged federal rights. Neither situation exists here.

The opinion of the Maryland Court of Appeals (Pet. 1A-8A) adopts a long line of Maryland authorities holding that a litigant has no standing to challenge the constitutionality or application of a statute unless an interest as a taxpayer is adequately alleged or unless the litigant alleges a special interest in the subject matter apart from that of the general public. The court properly found that Petitioner had made no such allegations in the instant case.

The ruling of the Maryland Court of Appeals concerns only the facts as alleged by the individual Petitioner. It is apparent from the court's opinion and from the prior Maryland decisions that other individuals or groups of individuals might well have standing to raise issues touched on by Petitioner and that the Maryland court in such event would decide on the merits a case which was properly presented to it. The Maryland doctrine of standing to sue, however, which is consistent with the general body of law on the subject, was intended to discourage, and rightly so, totally frivolous and ill-conceived litigation of which the instant case is a prime example.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS P. PERKINS, III,
Attorney for Respondent,
Maryland Marine Properties, Inc.

September 1, 1971

Supreme Court, U.S.
FILED
SEP 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

MARVIN MANDEL, GOVERNOR, LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY, AND JOHN LUETKEMEYER, TREASURER, CONSTITUTING THE BOARD OF PUBLIC WORKS OF MARYLAND; JAMES B. CAINE, INC., A MARYLAND CORPORTION, AND MARYLAND MARINE PROPERTIES, INC., A MARYLAND CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT, JAMES B. CAINE, INC., IN OPPOSITION

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IN THE

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OCTOBER TERM, 1971

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT, JAMES B. CAINE, INC., IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 261 Md. 436 and 276 A. 2d 56. The opinion of the Circuit Court for Worcester County, Maryland is unreported.

JURISDICTION

Jurisdiction is asserted by the petitioner pursuant to 28 U.S.C. 1257(3).

This respondent asserts, however, that the judgments sought to be reviewed were entered by the Court of Appeals of Maryland on November 16, 1970 and April 12, 1971 and the Petition was filed on August 9, 1971, more than ninety days after the entry of said judgments. This Court has no jurisdiction to entertain this Petition. 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to entertain this Petition since it was filed more than ninety days after the entry of the judgments by the Court of Appeals of Maryland.

2. Whether the issues decided below (i.e., the dismissal of an appeal because of late filing and the lack of petitioner's standing to sue) involve federal questions of substance.

STATUTE AND RULES INVOLVED

28 U.S.C. 2101:

> "(c) Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *."

Rule 812, Maryland Rules of Procedure:

> "(a) Whenever an appeal to this Court [Court of Appeals of Maryland] * * * is permitted by law, the order for appeal * * * shall be filed within thirty days from the date of the judgment appealed from, * * *."

Rule 870, Maryland Rules of Procedure:

> "Except as otherwise provided by Rules 835 (Dismissal of Appeal) and 871 (Remand), this Court will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended. The decision of this Court shall be final and conclusive."

Rule 876, Maryland Rules of Procedure:

> "(a) The order of this Court dismissing an appeal or affirming or reversing in whole or in part, or modifying the judgment from which the appeal was taken, or awarding a new trial, or entering a final judgment pursuant to Rule 875 (Final Judgment in This Court) shall be evidenced by the mandate of this Court which shall be certified under the seal of this Court by the Clerk. It shall not be necessary for any formal order or judgment other than the mandate to be signed or transmitted to the lower court.
>
> "(b) Unless otherwise ordered by this Court, the mandate shall be issued as of course by the Clerk upon the expiration of thirty days after the opinion of this Court has been filed or the order of judgment of this Court has been entered, and shall be transmitted by him to the lower court."

STATEMENT OF THE CASE

Petitioner filed suit against the Board of Public Works of Maryland (Board), this Respondent and another Maryland corporation seeking to set aside conveyances of land from the Board to the corporate respondents. Petitioner brought the suit in her capacity as a Maryland taxpayer and alleged that the conveyances in question of a portion of the submerged land lying between the high-water lines and the bulkhead lines adjacent to the shore of two bays in Worcester County, Maryland, would have a deleterious effect upon the environmental conditions of the bays.

All respondents challenged the legal sufficiency of the complaint by demurrer and the trial court sustained their demurrers.

The Petitioner noted a timely appeal from the adverse decision in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. Her appeal of the ruling in favor of this Respondent was not filed within the thirty day period required by Maryland Rule 812(a) and, accordingly, on November 16, 1970, the Court of Appeals of Maryland dismissed her appeal.

On April 12, 1971, the Court of Appeals entered a judgment affirming the order of the trial court in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. That decision was based solely on the ground that the Petitioner did not have standing to prosecute the suit.

This Petition was filed on August 9, 1971, 266 days after the entry of judgment in favor of this Respondent and 119 days after the entry of judgment in favor of the Co-Respondents.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION BECAUSE IT WAS FILED MORE THAN NINETY DAYS AFTER THE ENTRY OF THE JUDGMENTS OF WHICH REVIEW IS SOUGHT.

An order by the Court of Appeals of Maryland dismissing an appeal or affirming a judgment of a lower court constitutes a final judgment rendered by the highest Maryland court in which a decision may be had. Maryland Rule 870.

The order dismissing the appeal against this Respondent was entered on November 16, 1970. The order affirming the judgment in favor of the Co-Respondents was entered on

April 12, 1971. Both events occurred more than ninety days prior to the filing of the Petition.

Petitioner's contention that time should be measured from the date of issuance of the court's mandate is without merit. The entry of an order dispositive of an appeal constitutes a final judgment. That is the time "when the issues are adjudged." *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548, 551, 89 L. Ed. 1171, 1180, 65 S. Ct. 770 (1945). The subsequent issuance of the mandate is a routine function of the court clerk and is done simply to provide official evidence of the court's action. Maryland Rule 876.

It is clear that the issues raised by the Petition were adjudged by the Court of Appeals of Maryland more than 90 days prior to the filing of this Petition. This Court has no jurisdiction to entertain the Petition. 28 U.S.C. 2101(c).

II.

THE ISSUES DECIDED BELOW DID NOT INVOLVE FEDERAL QUESTIONS OF SUBSTANCE.

It is axiomatic that this Court will consider only those questions which were decided by the court below. The questions decided by the Maryland Court of Appeals and which were dispositive of this litigation involved the application of a local rule of procedure to the dismissal of an appeal because of late filing and a decision concerning the availability of Maryland's judicial machinery for the entertainment of a taxpayer suit.

The first question, involving the dismissal of the appeal against this Respondent presented the simple application of Maryland Rule 812(a) requiring an appeal to be noted within thirty days after the adverse ruling below.

The second question involved the application of the long-standing Maryland rule that Maryland taxpayers have no standing to prosecute actions in the Maryland courts challenging the validity of state action unless they show that the challenged action caused them a pecuniary loss or resulted in an increase of their taxes.

So long as the Maryland court in denying standing to the petitioner did not decide a federal question either directly or indirectly, this Court, based on its prior decisions, should not grant standing to the petitioner. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961).

The Maryland Court of Appeals did not incorrectly pass upon the propriety of any state action. Its decisions are in accord with its past decisions; they are in accord with the decisions of this Court; and they do not depart from the accepted and usual course of judicial proceedings. In short, the decisions do not present issues on important federal questions which should be settled by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 7, 1971.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 1971, three copies of this Brief in Opposition were mailed, postage prepaid to Leonard J. Kerpelman, 2403 Rogers Building, Baltimore, Maryland, 21209, counsel for the Petitioner. I further certify that all of the parties to be served have been served.

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